Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANTHONY HUGHES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

I.

WHEN THE PETITIONER, WHO WAS RECORDING SECRETARY FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 507, HAD BEEN WORKING FOR MANY YEARS AS A TOP ECHELON INFORMANT FOR THE FEDERAL BUREAU OF INVESTIGATION (FBI) AND WAS INDICTED IN AN INVESTIGATION SPEARHEADED BY THE UNITED STATES DEPARTMENT OF LABOR FOR CONDUCT SPECIFICALLY AUTHORIZED BY THE FBI, AND PETITIONER WAS PREVENTED FROM PRESENTING EVIDENCE CONCERNING THE DEFENSE OF AUTHORIZATION TO THE JURY BY THE CONDUCT OF A CO-DEFENDANT'S ATTORNEY WHO WAS LEAD COUNSEL IN PETITIONER'S JOINT TRIAL, WAS THE PETITIONER DEPRIVED OF HIS DUE PROCEDURAL RIGHTS BY THE COURT FAILING TO CONDUCT AN EVIDENTIARY HEARING ON PETITIONER'S WRIT OF ERROR CORAM NOBIS.

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For The Sixth Circuit

To The Honorable Chief Justice and Associated Justices of The Supreme Court Of The United States

Petitioner, **ANTHONY HUGHES**, respectfully prays that a writ of certiorari issue to review the September 30, 1993 judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final with the mandate issued by the Court on October 21, 1993.

OPINIONS BELOW

The September 30, 1993 decision of the United States Court of Appeals for the Sixth Circuit is unpublished and contained in the Appendix hereto, beginning at page A-1. The August 28, 1993 judgment of the United States District Court for the Northern District of Ohio, Eastern Division, is unpub1ished and contained in the Appendix hereto, beginning at page A-11.

JURISDICTIONAL STATEMENT

The judgment sought to be review is the Sixth Circuit's decision of September 30, 1993. The case concerned the filing of a Petition for Writ of Error Coram Nobis in the United States District Court for the Northern District of Ohio, Eastern Division, in which Petitioner sought to vacate the judgment and sentence previously entered in his prior criminal conviction, pursuant to the All Writs Act, as codified in 28 U.S.C. §1651(a). The Sixth Circuit reviewed and affirmed the adverse decision entered by the District Court, pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

No person shall be deprived of life, liberty or property without due process of law.

UNITED STATES CODE

Contained in the Appendix hereto are the provisions of the All Writs Act, 28 U.S.C. §1651(a).

STATEMENT OF THE CASE AND THE FACTS

A. STATEMENT OF THE CASE:

On May 16, 1986, an indictment was returned by the federal grand jury for the Northern District of Ohio, Eastern Division, in a case originally styled, United States v. Presser, et al., Case No. 86-114, naming Jackie Presser (Counts I, II, III, V and VII), Harold Friedman (Counts I through VI) and Appellant (Counts I, II and IV) as Defendants. Presser died prior to trial.

The indictment, in essence, alleged that from January, 1972, through December 31, 1981, Appellant, Presser and Harold Friedman engaged in a criminal enterprise, and conspired to do so, as officers and employees of Local 507 of the International Brotherhood of Teamsters and Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, by embezzling funds from Local 507 and Local 19 through the payment of salaries to "ghost employees", or employees who did not perform work for the union, in violation of 18 U.S.C. §§1962(d) and (c) -- RICO (Counts I and II), and 18 U.S.C. §§2 and 501(c) -- embezzlement of union funds (Counts III and IV); and, that Harold Friedman and Presser caused false 1981 reports to be filed with the Department of Labor regarding the salaries paid by Local 507 and Local 19 to "ghost employees", in violation of 18 U.S.C. §2 and 29 U.S.C. §439(b) and (d) (Counts V an VI). Presser was the only Defendant named in Count VII, false representation concerning 1981 payments to a pension plan, in violation of 18 U.S.C. §§2 and 1027.

The "pattern of racketeering activity" alleged in the RICO charge and incorporated as substantive offenses in the indictment concerned the payment of salaries to "ghost employees", in particular, the salary paid by Local 507 to Jack Nardi, Jr., from 1972 through December 31, 1978; the salary paid by Local 507 to Allen Friedman from 1972 through September 8, 1981; the salary paid by Local 507 to George Argie from August, 1978 through June, 1979; and, the salary paid by Local 19 to Appellant, as a business agent, from 1977 through 1981, when Appellant was part owner of The Forge Restaurant.

Jury trial began on October 25, 1988, and ended on January 10, 1989. The verdict was returned, on January 13, 1989, finding Appellant guilty on Count I (18 U.S.C. §1962[d]/RICO) and Count II (18 U.S.C. §1962[c]/RICO conspiracy). The jury returned a special verdict form finding the following acts of racketeering to support the RICO conviction: payments from Local 19 to Appellant from January 1, 1978 through December 31, 1978; payments from Local 507 to George Argie from January 1, 1979 through June 30, 1979; and, payments from Local 19 to Appellant from May 16, 1981 through December 31, 1981.

On May 26, 1989 and May 30, 1989, the Court pronounced judgment and sentence on Appellant, placing Appellant on probation for four (4) years; and, ordered Appellant to forfeit union positions as stipulated and certain funds and credits accrued by him. Sentence was stayed pending appeal.

Appellant's conviction was affirmed on Appeal. On January 3, 1991, the Court filed a Memorandum, Opinion and Order terminating Appellant's stay of sentence.

On May 20, 1992, Appellant filed a Petition for Writ of Error Coram Nobis, through new counsel, which joined in a prior Petition for Writ of Error Coram Nobis filed by Appellant's Co-Defendant, Harold Friedman, and alleged that Appellant's conviction in Cr. 86-114 was unjustly and unlawfully produced in violation of Appellant's fundamental right to due process of law, as guaranteed by the Fifth Amendment of the United States Constitution.

In support of his prayer for coram nobis relief, Appellant stated the following:

1. The criminal charges for which Appellant and Co-Defendant, Harold Friedman, were indicted and convicted concerned conduct specifically authorized and directed by responsible federal law enforcement officers of the Government, with the primary purpose of infiltrating organized crime and curtailing gangland violence in Cleveland, Ohio.

2. Appellant's indicted Co-Defendant, Jackie Presser, and his counsel were prepared to present evidence through the testimony of Presser regarding the Government's specific authorization and direction to commit the very conduct charged in the indictment;

and, thereby exonerate Presser, Appellant and Co-Defendant, Harold Friedman.

3. Paul J. Cambria, Esq., counsel for Co-Defendant, Harold Friedman, was privy to the defense strategy planned by Presser's counsel, and expressed his intention, through pretrial pleadings, court proceedings and opening statement to the jury, to present the defense of authorization, in addition to evidence concerning his client's good faith belief that the alleged "ghost employees" named in the indictment performed work for the Union.

4. Appellant did not want to come forward and personally present the defense of authorization because of his very real and justifiable belief that he and members of his family would be murdered if Appellant personally acknowledged his law enforcement relationship with the FBI as a confidential informant.

5. Prior to trial, Presser died and Appellant was forced to obtain new trial counsel; but had to substantially rely upon Mr. Cambria, counsel for Co-Defendant, Harold Friedman, as he [Cambria] was present during pretrial discovery, pretrial motions and had access to documents material to the defense of authorization which were not made available to Appellant's new counsel; and, Cambria could present the defense of authorization without jeopardizing the safety of his client, Harold Friedman, who was never a confidential informant for the FBI, and was not aware of Presser and Appellant's covert relationship with the FBI. Accordingly, Appellant directed his new counsel to follow Mr. Cambria's lead.

6. During the course of pretrial preparation with Appellant's new counsel, Appellant went to FBI headquarters in Washington, D.C., to review his file regarding the authorization given by the Government for the offenses charged. After momentarily receiving the file, it was retrieved by the FBI, but Appellant was

given the assurance of the Assistant Director of the FBI, Lawrence Potts, that the FBI would not abandon Appellant in this case.

7. Mr. Cambria, unexpectedly, refused to present the defense of authorization at the time of trial, as Cambria felt confident Appellant and Co-Defendant, Harold Friedman, could prevail without it; and, felt it would be a "needless waste of time". Cambria acted as lead counsel in this matter and Appellant did not want to do anything to hurt Co-Defendant Harold Friedman's defense. Cambria also told Appellant, in confidence that he was told by "the people in Buffalo" that Appellant would be murdered if he testified to being an informant for the FBI. Cambria also told Appellant that it would not "sit well" for him with "the people in Buffalo" if it appeared he was presenting a defense to help an FBI informant.

8. Appellant feared for his personal safety and the safety of his family if he personally acknowledged his informant status by testifying about the specific authorization given by the Government for the conduct charged in the indictment, but Appellant would have testified if requested by Mr. Cambria. Appellant's trial counsel, at Appellant's request and direction, concentrated on presenting evidence that Appellant did, in fact, perform work for the Union during the relevant time periods.

9. After Appellant's conviction, Lawrence Potts, Assistant Director for the FBI, wrote a letter to the Court acknowledging the valuable assistance given by Appellant and Presser in fighting organized crime. It was also publicly acknowledged, before sentencing, the assistance given by Presser to the FBI in "cleaning up" the Union from organized crime influences by providing the FBI with confidential information which was used to prosecute organized crime figures. While Appellant and Co-Defendant Friedman were convicted of a RICO violation, the court, in considering the facts and evidence

presented regarding Appellant and Co-Defendant Friedman sentenced each Defendant to a period of probation.

10. After the conviction of Appellant and Co-Defendant, Harold Friedman, Mr. Cambria acknowledged the importance of the defense of authorization and requested Appellant's assistance in relating facts concerning the Government's authorization of the conduct for which Appellant and Co-Defendant, Harold Friedman, were convicted, in a hearing before Frederick B. Lacey, the Independent Administer of the International Brotherhood of Teamsters (sometimes hereinafter referred to as the "Union").

11. Appellant felt morally obligated to assist Co-Defendant, Harold Friedman, as he had spent his entire life serving the Union, and had been wrongfully convicted and humiliated for conduct he was not aware of; and, which had been specifically directed and authorized by the Government to further the interest of justice.

12. Co-Defendant, Harold Friedman, has filed a Petition for Writ of Coram Nobis and the facts concerning Appellant's law enforcement relationship as a confidential informant for the FBI are now "out of the closet", along with Mr. Cambria's inexplicable failure to present the defense of authorization at time of trial which prejudicially affected both Co-Defendant Friedman's and Appellant's right to a fair trial, with due process of law, where the jury was informed by Mr. Cambria in opening statement that evidence would be presented to show Presser, the alleged co-conspirator of Co-Defendant, Harold Friedman, and Appellant, was an informant for the FBI and two (2) high ranking federal law enforcement officers in the FBI specifically directed and authorized Presser to hire and retain the alleged "ghost employees" named in the Indictment.

(See: May 20, 1992 Petition for Writ of Error Coram Nobis).

On June 4, 1992, the Government filed its Response to Appellant's Petition for Writ of Error Coram Nobis. The Government argued that Appellant had waived the defense of authorization at time of trial; and, that Appellant's due process argument was without merit. (See: June 4, 1992 Government's Response in Opposition to Appellant's Petition for Writ of Error Coram Nobis).

On July 1, 1992, Appellant filed a Reply Brief to the Government's Response, which alleged that the Government failed to address the "totality of the circumstances" concerning the unusual and particular facts at bar. Appellant argued that he was forced to rely upon Co-Defendant's counsel to present the authorization defense due to this being abandoned by his trial counsel, Michael Climaco and the Climaco law firm, following the death of Jackie Presser; that Mr. Cambria warned Appellant that he [Cambria] had reliable information that Appellant would be hurt if Appellant personally acknowledged the authorization given by the FBI to him to engage in the conduct charged in the indictment as a confidential undercover informant; and, that the Government's position in response was a classic example of the Government "burning its own informant". Appellant requested an evidentiary hearing in this matter to surface the facts which resulted in the production of his unlawful conviction.

On August 28, 1992, the trial court summarily denied Appellant's Petition for Writ of Error Coram Nobis, along with the Petitioned filed by Co-Defendant, Harold Friedman, without an evidentiary hearing, in a written Memorandum, Opinion and Order. (See: August 28, 1992 Memorandum, Opinion and Order).

B. STATEMENT OF THE FACTS:

Appellant is a life-long resident of Cleveland, Ohio. Appellant was a former heavyweight boxer and developed ties with people from all walks of life, including many alleged organized crime figures. In the late 1960s, Appellant was developed as an informant by Special Agent Martin P. McCann, Jr., a supervisory special agent in charge of the organized crime division for the Cleveland, Ohio office of the Federal Bureau of Investigation (FBI). Appellant was subsequently hired by Jackie Presser as an employee of Local 507 of the International Brotherhood of Teamsters and Local 19 of the Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO; and, through Appellant, Presser was developed as a "top

echelon informant" for the FBI.

During the course of their law enforcement relationship with the FBI as confidential undercover informants, Appellant and Presser reported directly to Special Agent McCann and the subsequent supervisory agents in charge of the organized crime division of the Cleveland, Ohio office of the FBI -- Special Agent Patrick J. Foran and Special Agent Robert S. Friedrick. Because of the highly sensitive and volatile nature of the information supplied by Appellant, and particularly Presser, great care was taken by the FBI to record this information in such a fashion that it could not be associated with Presser. (See: Affidavit of Special Agent McCann, attached as Exhibit H to Coram Nobis Appendix filed with Co-Defendant Friedman's Petition).[1]

During the course of the association of Appellant and Presser as confidential undercover informants for the FBI, a violent gang war erupted in Cleveland, Ohio between rival organized crime factions which had a direct impact on the structure of union activity on a national level. One (1) organized crime faction was lead by Daniel Greene. Greene was himself a "top echelon informant" for the Cleveland, Ohio office of the FBI, and was closely aligned with Teamster leader, John Nardi, Sr. The other rival organized crime faction represented the "old guard" and was lead by James Licavoli, a.k.a. Jack White, the reputed head of the La Cosa Nostra (LCN) family in Cleveland, Ohio. Licavoli was closely aligned with Milton Rockman, who, in turn, was very close with Teamster leaders William and Jackie Presser.

During the course of their relationship as confidential undercover informants for the FBI, Appellant and Presser were specifically directed and authorized by the FBI to hire or retain the following employees at Teamster Local 507 and/or Bakers Union Local 19 for the purpose of obtaining valuable information about organized crime activity in Cleveland, Ohio, and to prevent additional gangland violence, including the very real danger of murder to Appellant and Presser:

-- Jack Nardi Jr., the son of Jack Nardi, Sr., a close Greene associate and reputed organized crime figure in Cleveland, Ohio;

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[1]Unless otherwise identified, the exhibits filed by Appellant, Harold Friedman, in the Appendix to his Petition in the herein case, are specifically adopted by Appellant, Anthony Hughes.

-- Allen Friedman, a close Greene associate with close ties to organized crime figures in Cleveland, Ohio; and,

-- George Argie, a close associate of James Licavoli, the reputed boss of the LCN in Cleveland.

-- In addition, the FBI specifically directed and authorized Appellant to spend time at The Forge Restaurant while an employee for the Union, as many of Cleveland's organized crime figures "hung out" at The Forge Restaurant, and it was an invaluable place to get information on organized crime activity.

(See: Affidavit of Special Agent McCann [Exhibit H], Special Agent Foran [Exhibit I], Special Agent Friedrick [Exhibit J], Special Agent Thomas K. Kimmel [Exhibit K, K-1] incorporated in Coram Nobis Appendix filed by Co-Defendant, Harold Friedman).

The FBI believed that if Presser, for any reason, discharged the aforereferred to individuals, Presser's life would be in danger, and also authorized and encouraged Appellant to spend time at The Forge Restaurant while employed by the Union as Appellant was able to secure information concerning on-going gangland violence and corruption of Union activity. Id.

The threat of violence to Appellant and Presser was very real not only from their status as confidential informants, but also if they failed to abide by the wishes of various organized crime factions in retaining Jack Nardi, Jr., Allen Friedman and George Argie as employees of the Union, as violent organized crime retribution was rampant during this period of time, including:

-- the bombing and attempted murder of Eugene Ciasullo, a friend of Appellant and Licavoli by Greene associates;

-- the bombing murder of an innocent victim, Frank Percio, by Greene associates when a car bomb exploded which was intended for Allie Calabrese, a Licavoli associate;

-- the bombing murder of Enos Crnic, a Greene associate;

-- the bombing murder of Arthur Sneperger, a Greene associate;

-- the bombing murder of Shonder Burns, a Licavoli associate;

-- the attempted bombing murder of John Delzappo by Greene associates;

-- the beating death of John Conti by Greene associates;

-- the murder of former Union representative, Joseph Kovach, by Greene associates;

-- the murder of Hank Greco, a Greene associate;

-- the bombing murder of Stanley Moss, a Cleveland businessman affiliated with Greene;

-- the shooting death of Pete DeGravio after affronting local organized crime figures;

-- the bombing murder of Danny Greene, an FBI informant and organized crime figure;

-- the bombing murder of Jack Nardi, Sr., a Greene associate and Teamster leader;

-- the shooting death of Keith Ritson, a former Greene associate, by local organized crime figures;

-- the murder and decapitation of William Bostic after allegedly affronting local organized crime figures;

-- the murder and decomposition of Joseph Giamo after affronting local organized crime figures;

-- the murder of Orville Keith after affronting local organized crime figures;

-- the disappearance and presumed murder of Leo Morceri, a Licavoli associate;

-- the murder of former Teamster representative, Curtis Conley, after affronting local organized crime figures;

-- the murder of David Perrier after it was suspected he would testify against local organized crime figures;

-- the murder of former Greene associate, Ernest "Ted" Waite;

-- the murder of FBI "top echelon informant" and west coast LCN figure, Frank Bompensario, after Cleveland organized crime figures purchased documents from a clerk of the Cleveland, Ohio office of the FBI identifying Bompensario as a "top echelon informant";

-- the disappearance and presumed murder of former Teamster president, James Hoffa, by reputed LCN figures;

-- the murder of Teamster representative and confidant, Allen Dorfman;

-- the murder of Joseph Bonnerigo for allegedly affronting local organized crime figures; and,

-- the presumed disappearance and murder of Charlie Carabbia for allegedly affronting local organized crime figures.

In this climate, Appellant and Presser were directed by the FBI not to take any action against Union employees, Jack Nardi, Jr., Allen Friedman and George Argie, for fear that it would be met

with prompt gangland violence. At tremendous risk to his own safety, Appellant continued to provide valuable information to the FBI obtained from sources at The Forge Restaurant in an undercover capacity, at the direction of the Cleveland, Ohio office of the FBI. Information related by Appellant and Presser was maintained on an extremely confidential level, but directed to the highest levels of Government law enforcement, including the director of the FBI.

Presser went on to become president of the International Brotherhood of Teamsters through the assistance of the various LCN factions across the country, and with the full knowledge and support of the highest levels of federal law enforcement, including the director of the FBI, due to the invaluable information provided by Presser to rid the Teamsters of the historic influence of organized crime.

Incredibly, in 1986, as the result of an investigation conducted by the United States Department of Labor, Appellant and Presser were indicted along with Harold Friedman for the very conduct that had been specifically directed and authorized by the FBI, i.e. the hiring of Jack Nardi, Jr., the retention of Allen Friedman and the hiring of George Argie, along with the payment of a salary to Appellant while he spent a portion of his time at The Forge Restaurant, cultivating organized crime contacts and obtaining valuable information for the FBI. This very conduct had been authorized by the FBI, in the interest of justice, to prevent further gangland violence and thereby further the public peace.

Initially Presser was represented by John Climaco, Esq. and Appellant was represented by his brother, Michael Climaco, Esq. Harold Friedman was represented by Paul Cambria, Esq. It was the strategy of the defense that the conduct alleged in the Indictment had been specifically authorized and directed by the Government. Presser now had the power and security that came with being an international leader. Presser had become so powerful that he could call and speak with the President of the United States on a moment's notice. Presser no longer feared organized crime reprisals if he testified, as he was thoroughly insulated from the public. Presser was prepared to testify, at time of trial, regarding the defense of authorization; and, Presser's testimony could be corroborated by the Affidavits of Special Agents McCann and Foran and, if need be, the live testimony of top FBI officials, including Assistant FBI directors North, Potts and Moody, FBI superintendent

"Red" Felt and Special Agent McKinnis, the former head of the Cleveland office of the FBI during relevant times of the indictment.

Presser died prior to trial. This had a devastating impact on Appellant's defense. Presser's counsel, John Climaco, and his brother, Michael Climaco, refused to represent Appellant and claimed a conflict of interest. This left Appellant with no trial counsel.

During this period of time, Appellant was without counsel, and counsel for Co-Defendant, Harold Friedman, Paul Cambria, would stress to Appellant that he [Cambria] was the only attorney remaining in the case who had complete knowledge of the mass of documentation concerning this case; and, that whoever Appellant hired to represent him would have to follow Cambria's lead.

Appellant eventually retained Rocco J. Russo, Esq., and Elmer Giuliani, Esq., to represent him and obtained a four (4) month continuance to review the mass of documents involved in the case. Appellant's new counsel learned that no defense work had been prepared for Appellant during the two (2) year period Appellant was represented by the Climacos, as to investigating and developing witnesses who could testify that Appellant did, in fact, perform work for the Union. Instead, the Climacos had relied upon Presser's role as a crucial Government informant and Presser's ability to testify about his intimate relationship with both the highest levels of Government and members of organized crime, arising from the Government's authorization and direction to engage in the very conduct charged in the Indictment.

Presser's death put Appellant in an impossible position. Unlike Presser, Appellant was an easy target if he came forward and personally testified regarding his relationship with the Government as a confidential informant for the FBI in the very conduct for which he was charged; and, Appellant feared that his life and the lives of his family would be in danger if Appellant personally came forward and acknowledged the authorization given by the FBI. Appellant related these concerns to his new attorneys.

During this same time period, a civil Racketeering Influenced Organized Crime Operation (RICO) case against the International Brotherhood of Teamsters Union was being pursued in the United States District Court for the Southern District of New York, and a packet of informant information regarding Appellant and Presser was released to certain attorneys in this civil case.

Appellant learned from Mr. Cambria that he [Cambria] was given a copy of this file from John and Michael Climaco[2], but would not reveal its contents to Appellant's new counsel.

Appellant subsequently went to FBI headquarters in Washington, D.C., with his attorney, Rocco J. Russo, to attempt to obtain a copy of his informant file, and, in fact, was given a six (6) to seven (7) inch thick packet of documents containing informant information about Presser and himself, but within minutes of receiving this file, Appellant and his attorney were informed that a change in orders required the immediate return of the informant packet, again leaving Appellant and his attorney without the informant file. Assurance was given to Appellant, however, by his contact agent, Assistant FBI Director, Lawrence Potts, that Appellant should not worry because the FBI would not abandon him in this case.

During trial preparation in this case, Appellant's Co-Defendant, Harold Friedman, spent the majority of his time conducting Union business and left the matter of his defense entirely in the hands of Mr. Cambria. Appellant felt very bad for Co-Defendant, Harold Friedman, because he knew Friedman had nothing to do with the hiring or retaining of the alleged "ghost employees". Appellant felt confident, however, that his attorney, Mr. Cambria, would effectively present the defense of authorization at the time of trial, and thereby vindicate Co-Defendant, Harold Friedman, from any culpability, as Mr. Cambria had repeatedly fought for the admission of evidence concerning the defense of authorization in pretrial proceedings, and in his opening statement stated that evidence would be presented to the jury establishing the authorization given by the Government for the very conduct charged in the Indictment; and, that this authority had occurred while Presser was working in an undercover capacity as a confidential informant for the FBI which Co-Defendant, Harold Friedman, knew nothing about. (See: portions of Mr. Cambria's opening statement, attached as Exhibit R in Coram Nobis Appendix filed by Co-Defendant, Harold Friedman, in the herein matter).

Appellant believed he would benefit significantly from the presentation of the defense of authorization by Mr. Cambria at time of trial; and, Appellant would therefore not have to testify and

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[2]While Michael Climaco was excused for purposes of representing Petitioner at trial, the Court had ordered him to assist Petitioner in the preparation of his defense.

acknowledge his long-time informant status with the FBI, and thereby subject himself and his family to violent reprisals from organized crime figures.

Appellant related to his new attorneys his desire for them to follow Mr. Cambria's lead regarding the defense of authorization and, accordingly, they concentrated on developing evidence which established Appellant worked during the time period alleged in the Indictment.

Shortly before trial, Appellant's new attorneys motioned the Court for a second continuance so they could have additional time to develop evidence on Appellant's behalf concerning his work activity while employed by the Union. This request was denied and the matter proceeded to trial.

As anticipated, Mr. Cambria related to the jury, in opening statement, evidence which would be presented regarding the authorization specifically given by the Government to Presser, an alleged co-conspirator, to engage in the very conduct charged in the Indictment; and, that Co-Defendant, Harold Friedman, was unaware of the law enforcement relationship existing between the FBI and Presser. However, when the time came for Mr. Cambria to present the defense of authorization to the jury, Mr. Cambria took the position that sufficient evidence had been presented to show the alleged "ghost employees" performed work for the Union; and, that the presentation of the defense of authorization would be a needless waste of time, as the Affidavits of McCann and Foran were "worthless" in and of themselves. Appellant suggested that Mr. Cambria call a number of witnesses to back up the FBI affidavits including FBI directors North, Potts and Moody; FBI supervisor "Red" Felt; and, Special Agent McKinnis, the former head of the local FBI office during the relevant times of the indictment. Mr. Cambria rejected all of these witnesses as a useless waste of time, as he felt confident both Appellant and Co-Defendant, Harold Friedman, would prevail without the defense of authorization. Cambria also told Appellant, in confidence, that he (Cambria) had been told Appellant would be murdered if Appellant admitted to being an FBI informant.

Appellant and Co-Defendant, Harold Friedman, were convicted on the charges alleged in the Indictment. Before sentencing, Appellant contacted his "contact agent", Assistant FBI Director, Lawrence Potts, and requested Potts inform the Court of the assistance given by Appellant to the FBI and the federal

Government in fighting organized crime. A letter was sent by Assistant FBI Director Potts, under seal, to the Court noting Appellant's valuable assistance given in fighting organized crime. Prior to sentencing, it was also publicly disclosed that Presser had been a valuable informant for the FBI and helped "clean up" the Union from the influence of organized crime. At time of sentencing, the Court took all of the many factors into consideration concerning Appellant and Friedman, and sentenced them to a period of probation. (See news account dated March 12, 1989, attached hereto to Appellant's Petition for Writ of Error Coram Nobis, Exhibit A).

After the conviction of Appellant and Co-Defendant, Harold Friedman, Mr. Cambria acknowledged the importance of the defense of authorization and requested Appellant's assistance in relating facts concerning the Government's authorization of the conduct for which Appellant and Co-Defendant, Harold Friedman, were convicted, in a hearing before Frederick B. Lacey, the Independent Administrator of the International Brotherhood of Teamsters. Co-Defendant, Harold Friedman, had become very despondent following his conviction in this matter as he had spent his entire life serving the Union and had no control over the matter for which he was convicted. Appellant felt morally obligated to assist Co-Defendant, Harold Friedman, and testified before the Independent Administrator regarding the relationship of Appellant and Presser as undercover confidential informants for the FBI, and the specific authorization given by the Government for the conduct charged in the Indictment.

Co-Defendant, Harold Friedman, subsequently fired his attorney, Paul Cambria, and retained new counsel. New Counsel for Harold Friedman filed a Petition for Writ of Coram Nobis on his behalf setting forth Appellant's law enforcement relationship as a confidential informant for the FBI, along with Mr. Cambria's inexplicable failure to present the defense of authorization at time of trial.[3]

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[3]Failure of defense counsel to mount a viable defense had been held to be reversible error by the Sixth Circuit. [See: Beasley v. United States, 491 F.2d 687, 26 A.L.R. Fed. 204 (6TH Cir. 1974)].

REASON FOR GRANTING WRIT

I.

CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER A CONVICTED DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING ON A PETITION FOR WRIT OF ERROR CORAM NOBIS, WHEN PETITIONER, ACTING UNDER AUTHORIZATION BY THE FBI, WAS INDICTED FOR ENGAGING IN CONDUCT AUTHORIZED BY THE FBI.

The Sixth Circuit's ruling is in conflict with decisions of the First, Fourth, Fifth and Ninth Circuits, and the policy of law set forth by this Honorable Court in United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) and Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), in summarily denying, without an evidentiary hearing, a Petition for Post-Conviction Relief, on the grounds of ineffective assistance of counsel, where the Petition sets forth, and relies upon, facts occurring outside the courtroom and outside the trial record.

In United States v. Morgan, supra, the Court reviewed the denial of a Petition for Writ of Error Coram Nobis in which a post-conviction defendant sought to vacate his conviction on the grounds that his conviction was prejudicially produced without his fundamental and constitutional right to counsel.

In Morgan, this Court found that it could not be deduced from the record whether counsel had been properly waived and the post-conviction defendant was, therefore, entitled to an opportunity, through a due process hearing, to attempt to show that his conviction was invalid. "Otherwise a wrong may stand uncorrected which the available remedy would right." 346 U.S., at 512.

Similarly, in Machibroda v. United States, supra, this Court held when reviewing the summary denial, without an evidentiary hearing, of a post-conviction defendant's petition for habeas corpus relief, under 28 U.S.C. §2255, that it was error to make findings on issues of fact, without an evidentiary hearing, on

the Government's contention that the claims raised by the post-conviction defendant were "incredible, improbable and unbelievable", where the allegations made by the post-conviction defendant concerned facts outside the record and the motion and the files and records of the case do not conclusively show that the post-conviction defendant is entitled to no relief. This Court vacated and remanded the decisions of the lower courts, and found:

> "There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. §2255 can be served in this case only by affording the hearing which its provisions require." Machibroda v. United States, supra, at 496.

As previously reviewed, the Ninth Circuit in United States v. Burrows, supra, held that a District Court is required to hold an evidentiary hearing, where a post-conviction defendant claims, on facts outside the record, that he was prejudicially denied the effective assistance of counsel in failing to present evidence of a viable defense; and, the files and record in the case do not conclusively show the post-conviction defendant is entitled to no relief. See: United States v. Burrows, supra, at 917; Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988).

Similarly, the Fifth Circuit in United States v. Strother, 434 F.2d 1292 (5th Cir. 1970), cert. den. 409 U.S. 1011, 93 S.Ct. 456, 34 L.Ed.2d 305, held that a post-conviction defendant in a coram nobis proceeding is entitled to a meaningful hearing with findings based on evidence, unless the files and records of the case conclusively show that the petitioner is entitled to no relief.

The First Circuit in United States v. Rodriquez, 929 F.2d 747 (1st Cir. 1991), also held that an evidentiary hearing is required where a post-conviction defendant seeking to vacate his conviction on the grounds of ineffective assistance of counsel raises claims outside the trial record which can not be conclusively resolved in a manner to determine that the petitioner is entitled to no relief.

The Fourth Circuit in United States v. Magini, 973 F.2d 261 (4th Cir. 1992), has also found that an evidentiary hearing is required where a post-conviction defendant makes a claim of ineffective assistance of counsel involving inconsistencies beyond the record of material facts which are in dispute; and, the petitioner would be entitled to relief, if the facts as claimed in her petition were true.

In the case at bar, the Sixth Circuit has decided that a post-conviction defendant, in challenging his conviction on the grounds of ineffective assistance of counsel, is not entitled to an evidentiary hearing, even though the Petitioner's claims are based entirely on facts outside the courtroom and the trial record, and inconsistent with the factual findings proposed by the Government and summarily adopted by the District Court.

Accordingly, the Sixth Circuit's decision is in conflict with the law of other appellate circuit courts and the policy of law set forth by this Honorable Court; and, Petitioner respectfully submits that certiorari should be granted.

CONCLUSION

In the Court below, both the District Court and the United States Court of Appeals for the Sixth Circuit summarily denied Petitioner, **ANTHONY HUGHES**, a right to an evidentiary hearing on the basis of a self-serving letter written by Co-Defendant Friedman's trial attorney, Paul Cambria, after the conviction, in an attempt to rationalize and justify Cambria's bizarre conduct in arbitrarily abandoning a crucial and viable defense of Government authorization as promised to the jury in opening statement. This is true even though the self-serving letter, relied upon by the Court, was included by Petitioner **HUGHES** in his appendix to his Petition, along with the exhibits, to demonstrate the inconsistent and self-contradictory positions taken by his trial attorney in abandoning the defense of authorization at time of trial. Accordingly, the case presents novel and significant issues concerning the right of a convicted defendant to an evidentiary hearing in a coram nobis proceeding where facts concerning the ineffective assistance of counsel evolve outside the courtroom and outside the trial record.

The Opinion of the Sixth Circuit Court of Appeals in affirming the decision of the District Court regarding the denial of an evidentiary hearing in this matter is at odds with other federal

appellate circuits. The case also provides a factual scenario for the Court's consideration regarding the apparent willingness of the Government to "sweep under the rug" the conduct undertaken by one (1) law enforcement agency -- FBI -- if it is at odds with the conduct being prosecuted by another law enforcement agency -- the United States Department of Labor -- in a high profile criminal prosecution of Union leaders. Accordingly, Petitioner **HUGHES** prays this Honorable Court assert its jurisdiction and hear this case on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief for Defendant-Appellant, Anthony Hughes, has been served upon the Honorable Drew S. Days, III, Solicitor General, Department of Justice, Office of the Solicitor General, Tenth and Constitution Avenues, Room 5143, Washington, D.C. 20530; and, Leonard W. Yelsky, Esq., Counsel for Harold Friedman, 1050 Leader Building, Cleveland, Ohio 44114, by regular United States mail this _____ day of _____, 1993.

_____

ROBERT O. LAMPL, ESQ.
Counsel for Petitioner

APPENDIX

FILED

SEP 30 1993

LEONARD GREEN, CLERK

Nos. 92-3916/3917

UNITED STATES OF AMERICA	)	
	)	ON APPEAL FROM THE
Plaintiff-Appellee,	)	UNITED STATES DISTRICT
	)	COURT FOR THE NORTHERN
v.	)	DISTRICT OF OHIO
	)	
HAROLD FRIEDMAN and	)	
ANTHONY HUGHES,	)	
	)	(NOT RECOMMENDED FOR
Defendents-Appellants.	)	FULL-TEXT PUBLICATION)

BEFORE: KEITH and JONES, Circuit Judges; and PECK, Senior Circuit Judge.[1]

PER CURIAM. This case concerns petitions for writs of error coram nobis based on ineffective assistance of counsel and due process of law following Defendants' convictions for union fund embezzlement, RICO charges, and filing false reports with the Secretary of Labor. Finding that Defendant-Appellant Harold Friedman's counsel employed competent trial strategies, and that there existed no state action to support Defendant-Appellant Anthony Hughes' due process claim, the district court denied the petitions without an evidentiary hearing. We concur in the district court's findings and affirm the judgment below.

[1]Hon. John W. Peck, senior circuit judge, deceased September 7, 1993. Judge Peck participated in the oral argument but not the decision in this case.

I.

Friedman and Hughes were officers of a local chapter of the International Brothers of Teamsters. On May 16, 1986, the grand jury returned an indictment charging Friedman with the following: 1) violating the RICO statute, 18 U.S.C. §1962(c) (1988)(Count 1); 2) RICO conspiracy, 18 U.S.C. §1962(d) (1988 & Supp. 1993)(Count 2); 3) embezzlement of labor union funds, 29 U.S.C. §501(c)(1988) (Counts 3 and 4); and 4) filing false reports with the Secretary of Labor, 29 U.S.C. §439(b)(1988)(Counts 5 and 6). Hughes was also charged in Counts 1, 2 and 4. In general, the indictment alleged that for a decade Appellants conspired to and engaged in a criminal enterprise by embezzling funds through the payment of salaries to "ghost employees" who did no work.

The record shows that the jury acquitted Friedman on 23 of the 26 racketeering acts alleged in each of the RICO counts. Neverthe-less, the jury convicted Friedman on Counts 1, 2, 4 and 6, and Hughes on Counts 1, 2 and 4. Both Defendants were sentenced to serve four (4) years on probation, pay fines, and forfeit their union positions and certain funds they accrued. The Defendants pursued direct appeals, but this court affirmed their convictions.

On May 9, 1990, Friedman filed a motion for a new trial based on newly discovered evidence. The district court denied the motion on January 3, 1991, and this court affirmed that decision on September 24, 1991.

Having exhausted all other avenues of attacking his conviction, Friedman filed a petition for writ of error coram nobis on April 20, 1992. The petition claimed that his trial attorney deprived him of his Fifth and Sixth Amendment rights as a result of ineffective assistance of counsel. Also, Hughes filed a petition for writ of error coram nobis on May 20, 1992, asserting that conduct engaged in by Co-Defendant Friedman's trial attorney violated Hughes' Fifth Amendment due process rights.

To support his petition, Friedman contends that Paul J. Cambria, Petitioner's chief trial counsel, failed to mount an "authorization defense," that is, failed to claim that the govern-ment authorized the conduct in the indictment. Friedman alleges that the FBI recruited his Co-Defendants Hughes and Presser (now deceased) as informants. He maintains Hughes and Presser provided information to be used to rid the union of organized crime influences. Friedman contends that the government authorized and

directed Presser and Hughes to hire the "ghost employees" in order to curb possible gang violence against them.

Cambria did make a motion to dismiss the indictment based on the authorization defense, which the district court denied prior to trial. However, the court granted his motion to admit the affidavits of the FBI agents who allegedly authorized the conduct into evidence pursuant to Federal Rules of Evidence 804(b)(5). Then Cambria introduced the defense to the jury during his opening statement. Despite these efforts, Cambria did not continue the authorization defense during trial.

The district court made the following findings: 1) that the failure of Friedman's trial counsel to mount the authorization defense did not deprive him of due process or effective assistance of counsel under the Fifth and Sixth Amendments; and 2) that the government did nothing to interfere with Hughes' ability to present the authorization defense and that he voluntarily elected not to present that defense at the time of trial. Based on these findings, the district court denied both petitions of error coram nobis without an evidentiary hearing on August 28, 1992. The appeal followed.

II.

At any time following the entry of judgment against a defendant, the writ of error coram nobis is available to a convicted criminal. Flippins v. United States, 747 F.2d 1089, 1091 (6th Cir.), cert. denied 481 U.S. 1056 (1987). We have a limited scope of review of a challenged judgment on a petition for writ of error coram nobis. United States v. Norman, 391 F.2d 212, 213 (6th Cir.), cert. denied, 390 U.S. 1014 (1968). "Under coram nobis the court reviews errors of fact committed in the original proceeding which are 'of the most fundamental character, that is, such as rendered the proceeding itself invalid.'" Flippins, 747 F.2d at 1091 (quoting United States v. Mayer, 235 U.S. 55, 69 [1914]). At a minimum, relief will not be granted unless it is probable that a different result would have occurred if the error of fact had been known to the trial court. Id.

With the standard of review in mind, we turn to examine the claims in this case of ineffective assistance of counsel and denial of due process of law. Finally, we address the district court's denial of Hughes' discovery requests.

III.

The constitutionally guaranteed "right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). For a defendant to prevail on an ineffective assistance of counsel claim, he must show 1) that counsel's performance was so deficient that counsel's errors deprived the defendant of the "counsel" guaranteed by the Sixth Amendment, and 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The standard for measuring the attorney's performance is reasonable conduct under prevailing professional norms. Id. at 688. A court should not look back at a case with twenty-twenty hindsight and determine that counsel could have pursued a different defense. United States v. Lauga, 762 F.2d 1288, 1291 (5th Cir.), cert. denied, 474 U.S. 860 (1985). "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 [1955]). Strategic and tactical decisions, even if clearly wrong in retrospect, cannot support a claim for ineffective assistance of counsel. United States v. Yancey, 827 F.2d 83, 90 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988).

Trial counsel's tactics are not wholly immune from Sixth Amendment review, but the tactical decisions must be particularly egregious before they will provide a basis for relief. Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir. 1984). In Martin, the defense counsel literally stood mute at trial; he did not cross-examine any witnesses, interpose any objections, call any witnesses, object to any portion of the jury instructions, or deliver a closing argument. The attorney limited his opening statement to informing the jury that he would stand mute. Under those facts, this court found that the adversarial process had collapsed and the "tactic" of standing mute constituted ineffective assistance of counsel. Id. at 1250. "this was constitutional error even without any showing of prejudice." Id. at 1251.

In contrast with Martin, we cannot find that attorney

Cambria's tactical decision to abandon the authorization defense was anything but an exercise of reasonable professional judgment. In this circuit, a criminal defendant is denied effective assistance of counsel where defense strategies and tactics are employed which lawyers of ordinary training and skill in criminal law would not consider competent, if another tactic wold have defended the client better and this tactic was foreseeable at the time of trial. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

The evaluation of defense counsel's performance must consider all the circumstances, viewed as of the time of counsel's conduce. Strickland, 466 U.S. at 690. When we review all the circumstances surrounding this case, it must be noted that the FBI agents, who allegedly authorized the hiring of the employees, elected to assert their Fifth Amendment right not to testify on the matter, as did Co-Defendant Hughes. Thus, the authorization defense could only be presented through affidavits, rather than through live witnesses. More importantly, the affidavits did not clearly establish that the FBI did authorize ghost employees.

The only evidence purporting to explain counsel's conduct at trial is Petitioner's Exhibit W, a letter from Cambria to Defendant Friedman dated April 24, 1991. Although the explanation for not pursuing the authorization defense came after the fact, the letter gave two (2) reasons. First, Cambria points out the risk of conflicting defenses. The main defense argued that the alleged ghost employees actually worked (or that Friedman relied on Presser's representation that they did so), while the authoriza-tion defense would have argued that the employees were authorized by the FBI to receive salaries and not work. Second, the trial record shows that an FBI special agent testified on voir dire that Presser did not become an informant until late 1976 or early 1977, well after one of the alleged ghost employees, John Nardi, was hired. In light of this, Cambria believed mounting an authoriza-tion defense would only weaken the main defense by highlighting what appeared to be the government's strongest piece of evidence: Nardi's uncontradicted testimony that he did absolutely no work for the salary he received.

In assessing counsel's overall performance, we accord substantial weight to the benefits attorney Cambria achieved for Friedman. Six (6) counts of the indictment named Friedman. Two (2)) of those counts, both under the RICO statute, contained 26 predicate acts each. The jury acquitted Friedman on two (2)

substantive counts and on 23 of the 26 predicate acts in each RICO count. In addition, counsel Cambria's effectiveness as a sentencing advocate is supported by the punishment Friedman received: probationary sentence with no imprisonment.

Therefore, taking into account all circumstances at the time of trial, Cambria's strategy to not present the authorization defense was not only reasonable and logical, but was also, to a large degree, successful.

Friedman's second basis for writ of error coram nobis is that attorney Cambria mentioned the authorization defense during his opening statement, but never supported the defense at trial. It can be competent trial strategy to broach a defense during opening statement and later abandon it based on trial developments. See: Howard v. Davis, 815 F.2d 1429, 1433 (11th Cir.), cert. denied, 469 U.S> 931 (1984); United States v. Bailey, 734 F.2d 296, 305-06 (7th Cir.), cert. denied, 469 U.S. 931 (1984). Further, to succeed on an ineffective assistance claim, the defendant must show that counsel's deficient performance prejudiced him such that he did not receive a fair trial. Strickland, 466 U.S. at 687. "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Id. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 350 [1980]). Petitioner Friedman has introduced no evidence showing that Cambria's failure to present the defense prejudiced him. Moreover, nothing in the record remotely suggests that Cambria represented conflicting interests. The trial lasted two (2) entire months; therefore, it is extremely unlikely that the jury distinctly remembered all the defenses mentioned in the opening statements.

Accordingly, we affirm the district court's denial of Friedman's writ of error coram nobis.

IV.

Hughes claims attorney Cambria violated his Fifth Amendment right to due process by not presenting the authorization defense and by threatening him with mob violence if he testified. The Due Process Clause does not extend to impose an affirmative obligation on the State to protect individuals from actions of private citizens. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (2989). Petitioner Hughes' allegations center around attorney Cambria's conduct and do not implicate the State.

The conduct of privately retained counsel does not constitute state action, a necessary component of any due process claim. See: Polk County v. Dodson, 454 U.S. 312, 317-19 (1981). In Polk, the Supreme Court held "that a lawyer [public defender] representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of §1983." Id. at 318. If a public defender whose salary is paid from state funds is not a state actor, a fortiori a private counsel is not one.

Finding that there existed no state action upon which to rest a due process claim, we affirm the district court' denial of Hughes' writ of error coram nobis.

V.

Hughes requested discovery of a significant amount of informa-tion relating to his former attorneys, the Climacos. The district court denied this request and issued protective orders barring such discovery. In a coram nobis action, the district court has discretion to apply the appropriate rules for discovery based on the facts of each case. See: United States v. Balistrieri, 606 F.2d 216, 221 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980). "The district court should consider the amount of time which has elapsed since the trial, the burden of discovery on the government and witnesses, and the nature of the applicant's claims in deciding on the scope of discovery at each stage of the coram nobis proceedings." Id. at 221-22. In denying Hughes' discovery request, the district court found that the requested documents were irrelevant and that production of the documents would be overly burdensome. We believe the district court did not abuse its discretion in so finding.

First, approximately three (3) years had passed between the sentencing and the discovery request. Prior to Hughes' Reply to Government's Response in Opposition to Motion for Production of Documents there were never any suspicions raised about the climacos being government informants.

Second, granting discovery would impose legal and practical burdens on the government. In this case, Hughes sought information located beyond the files of the prosecution; fir instance, Hughes wanted to obtain information from the FBI on whether the Climacos had ever been informants. Furthermore, the documents requested numbered in the thousands.

Third, the nature of Hughes's coram nobis petition had

absolutely nothing to do with the Climacos. The petition specifically alleged that attorney Cambria's conduct at trial violated his due process rights. Inquiry about the Climacos, who ceased representing Hughes several months before trial, was not even remotely related to attorney Cambria's trial conduct. This point alone justifies the district court's denying the discovery request.

The decision of the district court is affirmed.

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. : CR 86-114
	)	
Plaintiff,	)	
	)	HON. GEORGE W. WHITE
v.	)	
	)	
HAROLD FRIEDMAN et al.,	)	**MEMORANDUM AND ORDER**
	)	
Defendents.	)	

Harold Friedman and Anthony Hughes have each filed Petitions for Writ of Error Coram Nobis, pursuant to 28 U.S.C. §1651, in the above-captioned matter. Both petitions are hereby denied.

On May 16, 1986, an indictment was returned by the federal grand jury for the Northern District of Ohio, Eastern Division, in a case originally styled, United States v. Presser, et al., Case No. CR 86-114, naming Jackie Presser (Counts I, II, III, V and VII), Harold Friedman (Counts I through VI) and Anthony Hughes (Counts I, II and IV) as Defendants. Defendant Presser died prior to trial.

The indictment, in essence, alleged that from January, 1972 through December 31, 1981, Presser, Friedman and Hughes engaged in a criminal enterprise, and conspired to do so, as officers and employees of Local 507 of the International Brotherhood of Teamsters and Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, by embezzling funds from Local 507 and Local 19 through the payment of salaries to "ghost employees," or employees who did not perform work for the union, in violation of 18 U.S.C. §§1962(c) and (d) - RICO (Counts I and II), and 18 U.S.C. §§2 and 501(c) - embezzlement of union funds (Counts III and IV); and, that Harold Friedman and Jackie Presser caused false reports to be filed with the Department of Labor regarding the salaries paid by Local 507 and Local 19 to "ghost employees," in violation of 18 U.S.C. §2 and 29 U.S.C. §439(b) and (d) (Counts V and VI). Presser was the only Defendant named in Count VII.

The "pattern of racketeering activity" alleged in the RICO charge and incorporated as substantive offenses in the indictment concerned the payment of salaries to "ghost employees", in particular, the salary paid by Local 507 to Jack Nardi, Jr. from 1972 through 1978; to Allen Friedman from 1972 through September of 1981; to George Argie from August of 1978 through June of 1979; and by Local 19 to Anthony Hughes from 1977 through 1981.

After jury trial, which began on October 15, 1988 and ended on January 10, 1989, Defendant Friedman was found guilty on four (4) out of the six (6) counts with which he was charged (Counts I, II, IV and VI), including the two (2) counts under the RICO statute. Defendant Hughes also was found guilty on the two (2) counts under the RICO statute (Counts I and II). In May of 1989, the Court pronounced judgment and sentence. Both Defendants were placed on probation for four (4) years and ordered to forfeit union positions as stipulated and certain funds and credits accrued by them. In addition, the Court imposed a fine of $35,000.00 on Defendant Friedman. The convictions were affirmed by the Sixth Circuit on July 26, 1990. The Court will now individually address each Petition for Writ of Error Coram Nobis.

I.

Petitioner Friedman asks this Court to vacate the judgment and sentence entered against him on the grounds that the failure of Petitioner's chief trail counsel, Paul J. Cambria, Jr., to mount a

critical and viable defense of which he had full knowledge, prejudicially deprived Petitioner Friedman of his constitutional rights to the effective assistance of counsel and due process of law as guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

In brief, Petitioner Friedman argues that both of his co-defendants, first Hughes and later Presser, were recruited as informants for the FBI to provide information which would be used to rid the Union of organized crime influences. Petitioner contends that the Government specifically authorized and directed Presser and Hughes to lure the "ghost employees," the very conduct charged in the indictment, in order to curb possible gangland violence against them. Cambria's failure to mount this "authorization defense" is the alleged misconduct underlying Friedman's petition to this Court.

Petitioner Friedman argues that before Presser died, Presser and his counsel were prepared to present evidence, through Presser's own testimony, establishing the authorization defense. According to the petition, following Presser's death, Paul Cambria, Defendant Friedman's counsel, who was privy to the defense strategy planned by Presser's counsel, expressed his similar intention to present the authorization defense. In that vein, Cambria made a motion to dismiss the indictment based on the defense, which the Court denied prior to trial. The Court granted, however, his motion to admit the affidavits of the FBI agents who allegedly authorized the conduct, into evidence under Federal Rule of Evidence 804(b)(5). Cambria then introduced the authorization defense to the jury during opening statement. Despite these efforts, however, Mr. Cambria did not mount the authorization defense during the trial.

Petitioner Friedman seeks to establish in the Writ of Error Coram Nobis that: (1) the authorization defense was appropriate and necessary to establish Petitioner's innocence; (2) Attorney Cambria had enough information at the time of trial to present the defense; and, (3) Petitioner was deprived of this substantial defense by the ineffectiveness of his counsel. In support of his contentions, Friedman states that he learned in July of 1991 that Attorney Cambria had misrepresented facts concerning documents related to the authorization defense; that Cambria concealed from him the value of the authorization defense; and that he abandoned the authorization defense against Petitioner's best interests.

More specifically, Petitioner Friedman claims that contrary to Cambria's representation that the decision to abandon the authorization defense was a collective decision among the defense attorneys, Cambria in fact demanded and maintained complete control of Friedman's defense. Friedman also avers that he did not knowledgeably approve waiving the authorization defense because Cambria had documentary evidence supporting the authorization defense, prior to trial, that he never reviewed with Friedman. In short, Petitioner claims he was misinformed by trial counsel as to the availability and viability of the authorization defense.

This Court finds that the failure of Petitioner Friedman's trial counsel to mount the authorization defense did not deprive Petitioner of due process or effective assistance of counsel under the Fifth and Sixth Amendments. Rather, counsel Cambria's decision not to pursue the authorization defense was a strategic, or tactical, trial decision made after careful deliberation. Instead of presenting the authorization defense, trial counsel chose to argue as his main defense that alleged ghost employees Allen Friedman, George Argie and Anthony Hughes had indeed performed Union work, and that Defendant Friedman had relied upon Presser's representations that alleged ghost employee John Nardi also performed work for the Union.

In order for a defendant to prevail on an ineffective assistance claim, defendant must show that counsel's allegedly deficient performance fell below an objective standard of reasonableness, and that prejudice resulted which deprived defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984). However, judicial review of a defense attorney's performance:

> . . . must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id., at 689. Thus, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . ." Id. A strategic decision, even if clearly wrong in retrospect, cannot support a claim that counsel's conduct

was deficient. United States v. Yancey, 827 F.2d 83, 90 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988).

If defense counsel's performance is evaluated considering all the circumstances, as required under Strickland, 466 U.S. at 688-690, then this Court must first recognize the substantial benefits defense counsel achieved for Defendant Friedman. Friedman was named in six (6) counts of the indictment. Two (2) of those counts were under the RICO statute and each contained 26 predicate acts. The jury acquitted Defendant Friedman on two (2) substantive counts and on 23 of the 26 predicate acts in each RICO count. In addition, counsel Cambria was a highly effective sentencing advocate. Friedman obtained a probationary sentence with no imprisonment. Further, his sentence and mandatory debarment were stayed for 19 months pending appeal.

A court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Strickland, 466 U.S. at 690. Petitioner's Exhibit W, a letter from Paul Cambria to Harold Friedman dated April 24, 1991, explains that Cambria decided not to present the authorization defense for two (2) reasons. First, Cambria points out that the inconsistency between arguing the main defense - that the alleged ghost employees actually worked (or that Friedman relied upon Presser's representations that the did so) - and arguing that they were authorized to receive salaries but not work, would actually weaken the main defense. Secondly, the trial record shows that FBI Special Agent Jerome Campane testified on voir dire that according to the Presser informant file, Jackie Presser did not become an informant until late 1976 or early 1977, well after alleged ghost employee John Nardi was hired. As reflected in Exhibit W, Cambria believed that unless the authorization defense could cove all four (4) employees, mounting an incomplete authorization defense would weaken the main defense, and would highlight what appeared to be the strongest part of the government's case - John Nardi's uncontradicted testimony that he did absolutely no work.

Although the reasons Cambria describes in the April 1991 letter for not pursuing the authorization defense are after-the-fact, this Court cannot find that Attorney Cambria's tactical decision was anything abut an exercise of reasonable professional judgment. It also should be noted that because the FBI agents elected to assert their Fifth Amendment rights, and because Co-Defendant Hughes

elected not to testify, the authorization defense could be presented only through affidavits, rather than live witnesses. Moreover, the affidavits did not clearly establish that the FBI specifically authorized George Argie and Anthony Hughes to receive salaries but not work. Therefore, in light of all the circumstances existing at the time of trial, the decision not to present the authorization defense satisfies an objective standard of reasonableness.

Petitioner Friedman's second basis for error coram nobis, Cambria's failure to pursue the authorization defense after mentioning it in opening statement, is similarly overruled. In an ineffective assistance claim the defendant must establish that counsel's deficient performance prejudiced the defense and deprived defendant of a fair trial. Strickland, 466 U.S. at 687. Defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding wold have been different. Id. at 694. This Court finds that Cambria's decision to alter the defense in response to trial events was competent trial strategy. Furthermore, Petitioner has not established that he suffered any prejudice as a result of the change in tactic. Petitioner's bare conclusion that, absent counsel's error there is a reasonable probability that the result would have been different, is wholly speculative.

Accordingly, the Petition for Writ of Error Coram Nobis filed by Harold Friedman is hereby denied.

II.

Anthony Hughes filed a Petition for Writ of Error Coram Nobis that joined in the petition filed by Harold Friedman. Petitioner Hughes also requests that this Court vacate the judgment and sentence entered on the grounds that Petitioner's conviction was unjust and unlawfully produced in violation of his fundamental right to due process of law as guaranteed by the Fifth Amendment of the United States Constitution. Petitioner Hughes does not claim that he was deprived of the effective assistance of counsel under the Sixth Amendment.

Hughes' petition also is based on the failure of Paul Cambria, trial counsel for Harold Friedman, to present the authorization defense. Prior to Jackie Presser's death, Presser and Hughes were represented by John and Michael Climaco. When Presser died, the Climacos withdrew as counsel and Petition obtained new trial counsel. However, he had to substantially rely on

Mr. Cambria because Cambria was present during pretrial discovery and motions, and had access to documents which were not made available to Petitioner's new counsel. In addition, Hughes states that he did not want to come forward and personally present the authorization defense because he feared violent reprisal against him and members of his family if he acknowledged his informant status. He reasoned, however, that Mr. Cambria could present the authorization defense without jeopardizing the safety of his client, Harold Friedman, who was never a confidential informant for the FBI. Hughes therefore directed his new counsel to follow Mr. Cambria's lead.

According to Hughes' petition, Cambria explained that his decision not to present the authorization defense at trial was because the people in Buffalo told him that Hughes would be murdered if he testified to being an informant, and that it would not "sit well" for Cambria if he presented the defense to help an informant. Petitioner Hughes contends that despite the risk, he would have testified if Cambria had requested that he do so. Instead, he told his own trial counsel to concentrate on presenting evidence that he did perform work for the union.

As the Government points out in its opening brief, Petitioner's contentions are not supported by the record. For instance, Hughes' informant status was publicly confirmed before and during the trial. In a hearing on March 9, 1987, counsel for both sides freely and publicly discussed Presser's and Hughes' relationship with the FBI and its impact on the authorization defense. On that date, government counsel also noted that, in a criminal case filed in another judicial district against FBI Special Agent Friedrick, the government had been forced to conform that Presser and Hughes had been FBI informants. During the trial itself, but before Hughes was required to decide whether to testify, FBI Special Agent Jerome Campane confirmed, during a voir dire examination, that Presser and Hughes had been informants.

Furthermore, Hughes testified on January 4, 1990 about his informant relationship with the FBI in civil proceedings before Teamsters Independent Administrator Frederick Lacey. Significantly, Hughes explained to Administrator Lacey that he did not testify at trial in Cleveland because he believed that the government had a weak case, not because he feared for his life.

The Court also finds significant the fact that Petitioner Hughes could have presented the authorization defense after his

Co-Defendant's counsel failed to do so. Counsel for Defendant Friedman, Paul Cambria, rested his case first. When Friedman rested without raising the authorization defense, Hughes still had an opportunity to do so. Nonetheless, he elected not to raise the defense.

Petitioner Hughes has argued that his due process rights were violated when he was charged and convicted for conduct which was specifically directed and authorized by the government, and that the prejudice incurred by Harold Friedman from Mr. Cambria's conduct infected his own right to a fair trial when the trial was joint and Cambria was lead counsel. However, there must be governmental action before the Due Process Clause can be violated. See e.g., DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). Petitioner contends that the government's continued denial of the legitimacy of the authori-zation defense was outrageous misconduct. Yes, in view of the totality of the circumstances, this Court finds that the government did nothing to interfere with Petitioner's ability to present that authorization defense and that he voluntarily elected not to present that defense at time of trial. In addition, any threats that Mr. Cambria, a privately retained attorney, may have made regarding violent mob retaliation if Hughes testified cannot be attributed to the government.

Accordingly, Anthony Hughes' Petition for Writ of Error Coram Nobis is hereby denied.

IT IS SO ORDERED.

George W. White
UNITED STATES DISTRICT JUDGE

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§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch 646, § 1, 62 Stat. 944; May 24, 1949, ch 139, § 90 63 Stat. 102.)